

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. [REDACTED] 48

UNITED STATES OF AMERICA FOR THE BENEFIT
AND ON BEHALF OF HARRY SHERMAN, CHAS
ROBINSON, RONALD D. WRIGHT, ET AL., PETI-
TIONERS,

vs.

DONALD G. CARTER INDIVIDUALLY, DONALD G.
CARTER, DOING BUSINESS AS CARTER CON-
STRUCTION COMPANY, ET AL.

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

WRITING FOR CERTIORARI FILED MARCH 12, 1955

CERTIORARI GRANTED APRIL 20, 1955

No. 14703

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA for the Benefit
and on Behalf of **HARRY SHERMAN,**
CHAS. ROBINSON, RONALD D. WRIGHT,
STUART SCOFIELD, LEE LALOR, WIL-
LIAM AMES, ERNEST CLEMENTS, CARL
LAWRENCE, GORDON POLLOCK and
HAROLD SJOBERG, as Trustees of the
Laborers Health and Welfare Trust Fund for
Northern California,

Appellant,

vs.

DONALD G. CARTER, Individually; **DONALD**
G. CARTER, Doing Business as **Carter Con-**
struction Company, CARTER CONSTRUC-
TION COMPANY and **HARTFORD AC-**
CIDENT AND INDEMNITY CO.,

Appellees.

Transcript of Record

Appeal from the United States District Court
Northern District of California
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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In the United States District Court, Northern
District of California, Southern Division
No. 33521

THE UNITED STATES OF AMERICA for the
Benefit and on Behalf of **HARRY SHERMAN,**
CHAS. ROBINSON, RONALD D. WRIGHT,
STUART SCOFIELD, LEE LALOR, WIL-
LIAM AMES, ERNEST CLEMENTS, CARL
LAWRENCE, GORDON POLLOCK and
HAROLD SJOBERG, as Trustees of the La-
borers Health and Welfare Trust Fund for
Northern California,
Plaintiffs,

vs.

DONALD G. CARTER, Individually, **DONALD G.**
CARTER d/b/a **CARTER CONSTRUCTION**
COMPANY, CARTER CONSTRUCTION
COMPANY, HARTFORD ACCIDENT AND
INDEMNITY CO., FIRST DOE, SECOND
DOE, THIRD DOE, BLACK CORPORA-
TION, WHITE CORPORATION, BLUE CO.,
a Partnership, and **GRAY CO.,** a Partner-
ship,
Defendants.

AMENDED COMPLAINT IN ACTION IN THE
NAME OF THE UNITED STATES FOR
THE BENEFIT OF FURNISHER OF
LABOR AND MATERIALS UNDER MA-
TERIALMENS' ACT

The United States of America suing herein for
the benefit and on behalf of Harry Sherman, Chas.

United States of America, etc. vs.

Robinson, Ronald D. Wright, Stuart Scofield, Lee Laler, William Ames, Ernest Clements, Carl Lawrence, Gordon Pollock and Harold Sjoberg, as trustees of the Laborers Health and Welfare Trust Fund for Northern California, complain of defendants, and each of them, and for cause of action allege:

I.

At all times herein mentioned plaintiffs were and now are the duly appointed, qualified and acting Trustees of the Laborers Health and Welfare Trust Fund for Northern California, hereinafter referred to as the "Fund," which Fund has its principal office in the City and County of San Francisco, State of California.

II.

Plaintiffs are informed and believe and upon such information and belief allege that defendants Donald G. Carter, Donald G. Carter doing business as Carter Construction Company and Carter Construction Company at all times mentioned herein were and now are residents of the City of Lincoln, County of Placer, State of California.

III.

Plaintiffs are informed and believe and upon such information and belief allege that at all times herein mentioned defendant Hartford Accident and Indemnity Co., was and now is a corporation organized and existing under the laws of the State of Connecticut.

IV.

Plaintiffs are ignorant of the true names of defendants First Doe, Second Doe, Third Doe, Black Corporation, White Corporation, Blue Co., a partnership, and Gray Co., a partnership, and therefore sue each of said defendants by said names, each of which is fictitious, and pray leave to substitute the true name of each of them when the same is ascertained.

V.

Plaintiffs are informed and believe and upon such information and belief allege that on or about November, 1952, defendant Donald G. Carter doing business as Carter Construction Company duly entered into two contracts in writing, one being Contract No. DA-04-167-ENG-936, with the United States of America, wherein and whereby it was agreed that said defendant was to furnish the material and perform the work for the construction and completion of the Fly-Away Kit Storage Building at Travis Air Force Base in the County of Solano, State of California, in accordance with the specifications, drawings, terms and conditions therein specifically set forth, in consideration whereof the United States of America agreed to pay to defendant Donald G. Carter doing business as Carter Construction Company a sum of money, the amount of which is unknown to plaintiffs, the other being Contract No. DA-04-167-ENG-961, with the United States of America, wherein and whereby it was agreed that said defendant was to furnish the material and perform the work for the con-

struction and completion of the Navigation Trainer Building at Mather Field in the County of Sacramento, State of California, in accordance with the specifications, drawings, terms and conditions therein specifically set forth, in consideration whereof the United States of America agreed to pay to defendant Donald G. Carter doing business as Carter Construction Company a sum of money, the amount of which is unknown to plaintiffs.

VI.

Plaintiffs are informed and believe and upon such information and belief allege that on or about November, 1952, pursuant to the Act of Congress, approved August 24, 1935, (40 U.S.C.A. Sec. 270(a)), and pursuant to the terms of the aforesaid contracts, the defendant Donald G. Carter doing business as Carter Construction Company, as principal, and defendant Hartford Accident and Indemnity Co., as surety, for a good and valuable consideration, duly made, executed and delivered to the United States of America, their bond or bonds conditioned as required by the said Act.

VII.

Plaintiffs are informed and believe and upon such information and belief allege that the defendant Donald G. Carter doing business as Carter Construction Company entered upon the performance of the said contracts for the construction of said Fly-Away Kit Storage Building and of said Navigation Trainer Building and furnished labor and ma-

materials therefor and continued to perform the contracts and the performance thereof has been completed and final settlement of said contracts has been made.

VIII.

Plaintiffs are informed and believe and upon such information and belief allege that less than one year has elapsed since the date of the final settlement of said contracts.

IX.

The Fund was created by a written Trust Agreement made and entered into on the 4th day of March, 1953, by and between Northern California Chapter and Central California Chapter, The Associated General Contractors of America, Inc., as Employers, and Northern California District Council of Hod Carriers, Building and Construction Laborers of the International Hod Carriers, Building and Common Laborers Union of America, as Union, pursuant to written collective bargaining agreements between said Employers and said Union. The Associated Home Builders of Sacramento, of which defendant Donald G. Carter doing business as Carter Construction Company was at all relevant times a member in good standing, signed said Trust Agreement and ratified and approved one of said collective bargaining agreements for and on behalf of, and as agent for, the members of said association, including defendant Donald G. Carter doing business as Carter Construction Company.

X.

By virtue of said written agreements and in consideration of labor and services performed and to

be performed for said defendant on said Fly-Away Kit Storage Building and said Navigation Trainer Building by laborers, said defendant Donald G. Carter doing business as Carter Construction Company agreed (a) that he would contribute and pay into the Fund in San Francisco, California, the sum of seven and one-half cents ($7\frac{1}{2}c$) per hour for each hour worked by any laborers employed by him on said buildings on and after February 1, 1953, in regular monthly installments starting on or before March 15, 1953, and continuing from month to month thereafter; (b) that in the event any one of said monthly contributions was not paid on or before the 25th day of the month in which said contribution became due, he would pay \$20.00 or 10 per cent of the amount of the contribution due, whichever was greater, into the Fund in San Francisco, California, as and for liquidated damages and not as a penalty; and (c) that in the event the Board of Trustees of said Fund consulted legal counsel with respect to any default in the payment of said contributions or filed any suit or claim with respect thereto against him, said Donald G. Carter doing business as Carter Construction Company would pay into the Fund in San Francisco, California, reasonable attorneys' fees, court costs and all other reasonable expenses incurred by the Board in connection with such suit or claim.

XI.

Under and pursuant to said written agreements and in consideration thereof, laborers performed

labor and services on said Fly-Away Kit Storage Building and said Navigation Trainer Building and defendants, and each of them, have defaulted in the performance of said written agreements and plaintiffs are informed and believe and upon such information and belief allege that by virtue of such default and in consideration of said labor and services rendered, there is now due, owing and unpaid to plaintiffs from defendants, and each of them, for labor and services performed for and on behalf of defendant Donald G. Carter doing business as Carter Construction Company by laborers on said buildings, the following sums:

(1) The sum of \$59.02 as and for the unpaid contribution to said Fund which became due on March 15, 1953;

(2) The sum of \$91.05 as and for the unpaid contribution to said Fund which became due on April 15, 1953;.

(3) The sum of \$79.87 as and for the unpaid contribution to said Fund which became due on May 15, 1953;

(4) The sum of \$60.00 as and for liquidated damages and not as a penalty by reason of said defendants' failure to pay said contributions in full on or before the 25th day of the months of March, April, and May, 1953;

(5) Interest at the legal rate on each of said sums from the respective due dates thereof; and

(6) The sum of \$200.00 as and for reasonable attorneys' fees in connection with the collection of said sums.

Plaintiffs are duly authorized to sue and collect said sums on behalf of and for the benefit of said laborers.

XII.

That the condition of the bond or bonds of defendants Hartford Accident and Indemnity Co., is such that if the said Donald G. Carter doing business as Carter Construction Company, shall promptly make payment to all persons supplying labor and materials in the prosecution of the work provided for in said contracts, and any and all duly authorized modifications of said contracts that might thereafter be made, then the obligation of said bond or bonds is to be void; otherwise, it is to remain in full force and virtue; and that although demand for payment of the aforementioned sums has been made upon said defendant Hartford Accident and Indemnity Co., said defendant has failed, neglected and refused and does still fail, neglect and refuse to pay said sums or any part thereof as it is obligated to do under said bond or bonds.

XIII.

Plaintiffs are informed and believe and upon such information and belief allege that more than ninety days have elapsed since the date on which the last of the labor as hereinabove more particularly set forth was done and performed in the prosecution of said work.

Wherefore, the United States of America, on behalf and to the use of Harry Sherman, Chas. Robinson, Ronald D. Wright, Stuart Scofield, Lee Lalor, William Ames, Ernest Clements, Carl Lawrence, Gordon Pollock and Harold Sjoberg, as Trustees of the Laborers Health and Welfare Trust Fund for Northern California, prays judgment against defendants, and each of them, for the sum of \$489.94 together with interest and costs, and for such other and further relief as the court may deem proper in the premises.

Dated this 9th day of June, 1954.

/s/ CHARLES P. SCULLY,
JOHNSON & STANTON,

By /s/ THOMAS E. STANTON, JR.,
Attorneys for Plaintiffs.

Duly Verified.

[Endorsed]: Filed June 9, 1954.

[Title of District Court and Cause.]

**NOTICE OF MOTION FOR SUMMARY
JUDGMENT**

To Charles P. Scully, Johnson & Stanton and
Thomas E. Stanton, Jr., Attorneys for the
Plaintiffs;

Please take notice that the undersigned will bring the attached Motion for Summary Judgment on for hearing before the Honorable Louis E. Goodman, at Room 258 of the Post Office and Courthouse Building at Seventh and Mission Streets in the City and

County of San Francisco, State of California, on the 10th day of January, 1955, at 9:30 o'clock a.m., or as soon thereafter as counsel can be heard, and that the motion will be submitted on the pleadings and admissions of the fact on file herein.

Dated: 20th day of December, 1954:

**DINKELSPIEL &
DINKELSPIEL,**

By /s/ **ROBERT J. DREWES,**

Attorneys for Defendant, Hartford Accident and Indemnity Company.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

The defendant, Hartford Accident and Indemnity Company, a corporation, by its attorneys, Dinkelspiel & Dinkelspiel and Robert J. Drewes, hereby moves the Court to enter summary judgment for said defendant, in accordance with the provisions of Rule 56(b) of the Rules of Civil Procedure, on the ground the pleadings and admissions of facts herein show that the defendant is entitled to judgment as a matter of law.

~~DINKELSPIEL &
DINKELSPIEL,~~

By /s/ **ROBERT J. DREWES,**

Attorneys for Defendant, Hartford Accident and Indemnity Company.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 20, 1954.

[Title of District Court and Cause.]

**ADMISSIONS OF FACTS FOR PURPOSES OF
MOTIONS FOR SUMMARY JUDGMENT**

It is Hereby Stipulated by the plaintiffs and by defendant Hartford Accident and Indemnity Company, by and through their respective attorneys of record, and solely for the purpose of the motion and cross-motion for summary judgment on file herein, as follows:

1. Said defendant admits each and every one of the allegations of the Amended Complaint on file herein.

2. The parties admit that each of the contracts referred to in Paragraph V of said Amended Complaint provides in Paragraph 14 that said contract is subject to all provisions and exceptions of the Davis-Bacon Act (40 U.S.C. 276(a)) including the provision that the contractor "shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by applicable regulations prescribed by the Secretary of Labor), the full amounts accrued at time of payment computed at wage rates not less than those stated in the specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or sub-contractor, and such laborers and mechanics * * *

3. The parties admit that the contractor named

in said contract paid the wage rates stated in the specifications referred to in said contracts, weekly in full, and without deduction or rebate on any account. No deduction was made or required to be made from said wage rates for payments into the Fund referred to in said Amended Complaint.

4. The parties admit that the bonds referred to in Paragraph VI of said complaint consisted of a Performance Bond with respect to each contract in the form attached as Exhibit A, and a Payment Bond in connection with each contract in the form attached as Exhibit B. It is admitted that in each case the limit of the bond is adequate to pay the amount of the plaintiff's claim, if such claim is properly allowable against said bond.

5. The parties agree that a true and correct copy of the Trust Agreement referred to in Paragraph IX of said Amended Complaint is attached as Exhibit C.

Dated: November 18, 1954.

CHARLES P. SCULLY,
JOHNSON & STANTON,

By /s/ THOMAS E. STANTON, JR.,
Attorneys for Plaintiffs.

DINKELSPIEL &
DINKELSPIEL,

By /s/ ROBERT J. DREWES,
Attorneys for Defendant, Hartford Accident and
Indemnity Co.

[Endorsed]: Filed December 23, 1954.

EXHIBIT A

(Copy)

Standard Form 25. Revised November, 1950. Prescribed by General Services Administration. General Regulation No. 5.

Date Bond Executed:
January 2, 1953.

Performance Bond
(See Instructions on Reverse)

Principal:

Donald G. Carter, an Individual, dba Carter Construction Company, 724 - 56th Street, Sacramento, California.

Surety:

Hartford Accident and Indemnity Company, a body corporate, duly incorporated under the laws of the State of Connecticut and authorized to act as surety under the act of Congress, approved August 13, 1894, as amended by the act of congress, approved March 23, 1910, whose principal office is located in the city of Hartford.

Penal Sum of Bond (express in words and figures)
Fifty-Two Thousand Four Hundred Thirty-Four and 30/100 Dollars (\$52,434.30).

Contract No.:

DA 04—167 eng 936.

Date of Contract:

January 2, 1953.

Know All Men by These Presents, That we, the Principal and Surety above named, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of the amount stated above, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation is Such, that whereas the principal entered into a certain contract with the Government, numbered and dated as shown above and hereto attached;

Now Therefore, if the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several

seals on the date indicated above, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

* * *

The rate of premium on this bond is \$10.00 per thousand on contract price.

Total amount of premium charged, \$1,048.69.

(The above must be filled in by corporate surety)

[Certificate as to Corporate Principal and Instructions.]

EXHIBIT B

(Copy)

PAYMENT BOND

(See Instructions on Reverse)

Standard Form 25A

Revised November, 1950

Prescribed by General

Services Administration

General Regulation No. 5

Date Bond Executed:

January 2, 1953.

Principal:

Donald G. Carter, an Individual d/b/a Carter
Construction Company, 724-56th Street, Sacramento, California.

Surety:

Hartford Accident and Indemnity Company,
a body corporate, duly incorporated under the
laws of the State of Connecticut and author-
ized to act as surety under the act of Con-
gress, approved August 13, 1894, as amended
by the act of Congress, approved March 23,
1910, whose principal office is located in the
City of Hartford.

Penal Sum of Bond (express in words and figures):

Fifty-Two Thousand Four Hundred Thirty-
Four and 30/100 Dollars (\$52,434.30).

Contract No:

DA 04—167 eng 936.

Date of Contract:

January 2, 1953.

Know All Men by These Presents, That we, the
Principal and Surety above named, are held and
firmly bound unto the United States of America,
hereinafter called the Government, in the penal sum
of the amount stated above, for the payment of
which sum well and truly to be made, we bind our-
selves, our heirs, executors, administrators, and suc-
cessors, jointly and severally, firmly by these pres-
ents.

The Condition of This Obligation is Such, that
whereas the principal entered into a certain con-

tract with the Government, numbered and dated as shown above and hereto attached.

Now Therefore, if the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals on the date indicated above, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

* * *

The rate of premium on this bond is (Premium included on Performance Bond) per thousand.

Total amount of premium charged, \$1,048.69.

(The above must be filled in by corporate surety)

[Certificate as to Corporate Principal and Instructions.]

Exhibit C

TRUST AGREEMENT

**LABORERS HEALTH AND WELFARE
TRUST FUND
FOR NORTHERN CALIFORNIA**

Between

**NORTHERN CALIFORNIA CHAPTER
AND CENTRAL CALIFORNIA
CHAPTER OF THE
ASSOCIATED GENERAL
CONTRACTORS OF AMERICA, INC.**



and

**NORTHERN CALIFORNIA
DISTRICT COUNCIL OF
HOD CARRIERS, BUILDING AND
CONSTRUCTION LABORERS**

Affiliated with

**THE INTERNATIONAL
HOD CARRIERS, BUILDING AND
COMMON LABORERS' UNION
OF AMERICA**



TRUST AGREEMENT

**LABORERS HEALTH AND WELFARE
TRUST FUND
FOR NORTHERN CALIFORNIA**

Between
**NORTHERN CALIFORNIA CHAPTER
AND CENTRAL CALIFORNIA
CHAPTER OF THE
ASSOCIATED GENERAL
CONTRACTORS OF AMERICA, INC.**



and

**NORTHERN CALIFORNIA
DISTRICT COUNCIL OF
HOD CARRIERS, BUILDING AND
CONSTRUCTION LABORERS**

Affiliated with
**THE INTERNATIONAL
HOD CARRIERS, BUILDING, AND
COMMON LABORERS' UNION
OF AMERICA**



TRUST AGREEMENT

LABORERS HEALTH AND WELFARE

TRUST FUND FOR NORTHERN CALIFORNIA

This TRUST AGREEMENT, made and entered into as of the 4th day of March, 1953, by and between NORTHERN CALIFORNIA CHAPTER AND CENTRAL CALIFORNIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., hereinafter referred to as the "Employers," and NORTHERN CALIFORNIA DISTRICT COUNCIL OF HOD CARRIERS, BUILDING AND CONSTRUCTION LABORERS OF THE INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, hereinafter referred to as the "Union," recites and provides as follows:

Recitals:

1. The Employers, and the other employer organizations signatory to this agreement, are parties to various collective bargaining agreements with the Union which provide that commencing on February 1, 1953, each individual employer covered by any of said agreements will contribute the sum of seven and one-half cents * (7½c) per hour for each hour worked by employees under such agreements to a Health and Welfare Plan to be established for the benefit of such employees.
2. The parties have agreed that such contributions shall be payable to and be deposited in the Trust Fund created and established by this trust agreement.
3. The purpose of this trust agreement is to provide for the establishment of such Trust Fund and for the maintenance of such Health and Welfare Plan in accordance with the terms of the collective bargaining agreements.

Provisions:

In consideration of the foregoing, and of the mutual promises hereinafter provided, the parties agree as follows:

*Effective February 1, 1955, this rate of contribution was increased to ten cents (10c) per hour by amendment to the collective bargaining agreements.

ARTICLE I.

Definitions

Unless the context or subject matter otherwise requires, the following definitions shall govern in this trust agreement:

Section 1.

The term "collective bargaining agreements" includes (a) the Master Agreement between Employers and the Union for the 46 Northern California Counties dated June 4, 1952, and the Tunnel Master Agreement between Employers and Union, dated June 18, 1952, (b) any other collective bargaining agreement between the Union, or any of its affiliated local unions, and any employer organization or individual employer which provides for the making of employer contributions to the Fund, and (c) any extension or renewal of any of said agreements which provides for the making of employer contributions to the Fund.

Section 2.

The term "individual employer" means any employer who is required by any of the collective bargaining agreements to make contributions to the Fund, or who does in fact make one or more contributions to the Fund.

Section 3.

The term "employee" means any employee of an individual employer who performs work covered by any of the collective bargaining agreements.

Section 4.

The term "Fund" means the trust fund created and established by this agreement.

Section 5.

The term "Health and Welfare Plan" means the Health and Welfare Plan established by the Employers and the Union pursuant to the collective bargaining agreements, and any amendments to or modifications of said Plan pursuant to such agreements.

Section 6.

The term "signatory association" means any employer organization, other than Employers, which signs this agreement on behalf of its members or executes on behalf of such members a written acceptance of any agreement to be bound by the terms of this agreement.

ARTICLE II.

Trust Fund

Section 1.

There is hereby created the LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, which shall consist of all contributions required by the collective bargaining agreements to be made for the establishment and maintenance of the Health and Welfare Plan, and all interest, income and other returns thereon of any kind whatsoever.

Section 2.

The Fund shall have its principal office in the City and County of San Francisco.

Section 3.

Contributions to the Fund shall not constitute or be deemed to be wages due to the employees with respect to whose work such payments are made, and no employee shall be entitled to receive any part of the contributions made or required to be made to the Fund in lieu of the benefits provided by the Health and Welfare Plan.

Section 4.

Neither the Employers, any signatory association, any individual employer, the Union, any beneficiary of the Health and Welfare Plan nor any other person shall have any right, title or interest in the Fund other than as specifically provided in this agreement, and no part of the Fund shall revert to the Employers, any signatory association or any individual employer. Neither the Fund nor any contributions to the Fund shall be in any manner liable for or subject to the debts, contracts or liabilities

of the Employers, any signatory association, any individual employer, the Union, or any employee. No part of the Fund, nor any benefits payable in accordance with the Health and Welfare Plan shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge by any person; provided, however, that the Board of Trustees shall establish a procedure whereby any employee may direct that benefits due him be paid to an institution in which he is hospitalized in consideration for medical or hospital services rendered or to be rendered.

Section 5.

Neither the Employers or any signatory association, nor any officer, agent, employee or committee member of the Employers or any signatory association, shall be liable to make contributions to the Fund or be under any other liability to the Fund or with respect to the Health and Welfare Plan, except to the extent that he may be an individual employer required to make contributions to the Fund with respect to his own individual or joint venture operations, or to the extent he may incur liability as a trustee as hereinafter provided. The liability of any individual employer to the Fund, or with respect to the Health and Welfare Plan, shall be limited to the payments required by the collective bargaining agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the contributions due from other individual employers with respect to the operations of such employers. The individual employers shall not be required to make any further payments or contributions to the cost of operation of the Fund or of the Health and Welfare Plan, except as may be hereafter provided in the collective bargaining agreements.

Section 6.

Neither the Employers, any signatory association, any individual employer, the Union, nor any employee shall be liable or responsible for any debts, liabilities or obligations of the Fund or the trustees.

Section 7.

Contributions to the Fund shall be due commencing February 1, 1953, for work on or after that date, and shall be payable in San Francisco, California, in regular monthly installments starting on or before March 15, 1953, and continuing from month to month thereafter subject to the provisions of the collective bargaining agreements. The contribution payable on or before March 15, 1953, shall include all payments which have theretofore accrued for work performed during the period from February 1, 1953, up to the close of the individual employer's payroll period ending closest to the last day of that month, and thereafter each monthly contribution shall include all payments which have accrued in the interim for work performed up to the close of the individual employer's payroll period ending closest to the last day of the preceding calendar month. Each monthly contribution shall be accompanied by a report in a form prescribed by the Board of Trustees.

Section 8.

Each contribution to the Fund shall be made promptly, and in any event on or before the 25th day of the calendar month in which it becomes payable, on which date said contribution, if not then paid in full, shall be delinquent. If any individual employer fails to make his or its monthly contribution in full on or before the 25th day of the month on four occasions within any twelve-month period, the Board of Trustees may provide by resolution that thereafter during the twelve-month period immediately following such resolution the 15th day of the month shall be the delinquency date for such individual employer. The parties recognize and acknowledge that the regular and prompt payment of employer contributions to the Fund is essential to the maintenance in effect of the Health and Welfare Plan, and that it would be extremely difficult, if not impracticable to fix the actual expense and damage to the Fund and to the Health and Welfare Plan which would result from the failure of an individual employer to pay such monthly contributions in full within

the time above provided. Therefore, the amount of damage to the Fund and Health and Welfare Plan resulting from any such failure shall be presumed to be the sum of \$20 per delinquency or 10% of the amount of the contribution or contributions due, whichever is greater, which amount shall become due and payable to the Fund as liquidated damages and not as a penalty, in San Francisco, California, upon the day immediately following the date on which the contribution or contributions become delinquent and shall be in addition to said delinquent contribution or contributions.

ARTICLE III.

Board of Trustees

Section 1.

The Fund shall be administered by a Board of Trustees which shall consist of five trustees representing the individual employers and five trustees representing the employees. The trustees representing the individual employers shall be appointed in writing by the Employers, who are hereby irrevocably designated by each individual employer as his or its attorneys in fact for the purpose of appointing and removing trustees and successor trustees. The trustees representing the employees shall be appointed by the Union by an instrument in writing signed by the Executive Officer of the Union, and bearing the Union seal. The trustees so appointed shall sign this trust agreement or a duplicate thereof, and such signatures shall constitute their acceptance of office and agreement to act under and be subject to all of the terms and conditions of this trust agreement.

Section 2.

The trustees shall select one of their number to act as Chairman of the Board of Trustees and one to act as Co-Chairman, to serve for such period as the trustees shall determine. When the Chairman is selected from among the Employer Trustees, the Co-Chairman shall be selected from among the Employee Trustees, and vice versa.

Section 3.

Each trustee shall serve until his death, resignation or removal from office.

Section 4.

A trustee may resign at any time by serving written notice of such resignation upon the Chairman and Co-Chairman of the Board of Trustees, and upon the Employers and the Union, at least 30 days prior to the date on which such resignation is to be effective.

Section 5.

Any Employer Trustee may be removed from office at any time, for any reason, by an instrument in writing signed by the Employers, and served on the trustee, the Chairman and Co-Chairman of the Board of Trustees and the Union. Any Employee Trustee may be removed from office at any time, for any reason, by an instrument in writing signed by the Executive Officer of the Union, and bearing the Union seal and served on the trustee, the Chairman and Co-Chairman of the Board of Trustees and the Employers.

Section 6.

If any Employer Trustee dies, resigns or is removed from office, a successor trustee shall be appointed forthwith by an instrument in writing signed by the Employers. If any Employee Trustee dies, resigns or is removed from office, a successor trustee shall be appointed forthwith by an instrument in writing signed by the Executive Officer of the Union and bearing the Union seal. Any successor trustee so appointed shall sign this trust agreement, or a duplicate thereof, and such signature shall constitute his acceptance of office and agreement to act under and be subject to all of the terms and conditions of this trust agreement.

ARTICLE IV.

Functions and Powers of Board of Trustees

Section 1.

The Board of Trustees shall have the power to admin-

ister the Fund and to administer and maintain the Health and Welfare Plan in effect.

Section 2.

The Board of Trustees shall collect and receive all contributions due to the Fund, and shall deposit such contributions in a special trust fund account or accounts established in a reputable bank or banks located in the city and county of the principal office of the Fund.

Section 3.

The Board of Trustees shall have the power to demand and enforce the prompt payment of contributions to the Fund, and the payments due to delinquencies as provided in Section 8 of Article II. If any individual employer defaults in the making of such contributions or payments and if the Board consults legal counsel with respect thereto, or files any suit or claim with respect thereto, there shall be added to the obligation of the employer who is in default, reasonable attorneys' fees, court costs and all other reasonable expenses incurred by the Board in connection with such suit or claim.

Section 4.

The Board of Trustees shall promptly use the moneys available in the Fund first to provide the benefits specified in the Health and Welfare Plan. The Board shall have power to enter into contracts and procure insurance policies necessary to place into effect and maintain the Health and Welfare Plan, to terminate, modify or renew any such contracts or policies subject to the provisions of the Plan, and to exercise and claim all rights and benefits granted to the Board or the Fund by any such contracts or policies. Any such contract may be executed in the name of the Fund, and any such policy may be procured in such name.

Section 5.

The Board of Trustees shall have power:

(A) To pay out of the Fund the reasonable expenses incurred in the establishment of the Fund and the Health and Welfare Plan.

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(B) To establish and accumulate such reserve funds as may be adequate to provide for administration expenses and other obligations of the Fund, including the maintenance in effect of the Health and Welfare Plan.

(C) To employ such executive, consultant, administrative, clerical, secretarial and legal personnel and other employees and assistants, as may be necessary in connection with the administration of the Fund and the Health and Welfare Plan and to pay or cause to be paid, out of the Fund, the compensation and necessary expenses of such personnel and assistants and the cost of office space, furnishings and supplies and other essentials required in such administration. If the Board is unable to agree upon the employment of either a consultant or an attorney pursuant to this clause, the Employer Trustees and the Employee Trustees may each select either a consultant or an attorney, or both, as the case may require, who shall be directed to act jointly with each other in connection with the administration of the Fund, and the reasonable cost of such advice or services shall be paid from the Fund.

(D) To incur and pay out of the Fund any other expense reasonably incidental to the administration of the Fund or the Health and Welfare Plan.

(E) To compromise, settle, or release claims or demands in favor of or against the Fund on such terms and conditions as the Board may deem desirable; provided, however, that this clause shall not excuse any violation of any of the collective bargaining agreements.

(F) To invest and reinvest such portion of the Fund as is not required for current expenditures and charges in bonds of the United States.

(G) To adopt rules and regulations for the administration of the Fund and the Health and Welfare Plan which are not inconsistent with the terms and intent of this agreement and such Plan.

Section 6.

The Board of Trustees shall procure fidelity bonds for each trustee or other person authorized to receive, handle,

deal with or draw upon the moneys in the Fund for any purpose whatsoever, said bonds to be in such reasonable amount and to be obtained from such source as the Board shall determine. The cost of such bonds shall be paid out of the Fund.

Section 7.

All checks, drafts, vouchers or other withdrawals of money from the Fund shall be authorized in writing or countersigned by at least one Employer Trustee and one Employee Trustee.

Section 8.

The Board of Trustees shall maintain suitable and adequate records of and for the administration of the Fund and the Health and Welfare Plan. The Board may require the Employers, any signatory association, any individual employer, the Union, any employee or any other beneficiary under the Health and Welfare Plan to submit to it any information, data, report or documents reasonably relevant to and suitable for the purposes of such administration; provided, however, that the Union shall not be required to submit lists of membership. The parties agree that they will use their best efforts to secure compliance with any reasonable request of the Board for any such information, data, report or documents. Upon request in writing from the Board, any individual employer will permit a certified public accountant selected by the Board to enter upon the premises of such employer during business hours, at a reasonable time or times, and to examine and copy such books, records, papers or reports of such employer as may be necessary to determine whether the employer is making full and prompt payment of all sums required to be paid by him or it to the Fund.

Section 9.

The books of account and records of the Board of Trustees, including the books of account and records pertaining to the Fund, shall be audited at least once each year by a qualified certified public accountant to be se-

lected by the Board. The Board shall also make all other reports required by law. A statement of the results of the annual audit shall be available for inspection by interested persons at the principal office of the Fund and at such other suitable place as the Board may designate from time to time. Copies of such statement shall be delivered to the Employers, the Union and each trustee within five days after the statement is prepared.

Section 10.

The Board of Trustees may coordinate its activities in the administration of the Fund and the Health and Welfare Plan with the administrative activities of the boards of trustees of other trust funds and health and welfare plans established or to be established in California to such extent as may be necessary or desirable to minimize administrative costs, eliminate unnecessary bookkeeping and other expenses for the individual employers and avoid or eliminate duplicating employer contributions or insurance coverage with relation to the same employee. The Board may agree to exercise and exercise any of its functions and powers jointly with any one or more of the board of trustees of such other trust funds, and it may agree to join with and join with any one or more of said boards in establishing a joint office or joint administrative personnel.

ARTICLE V.

Procedure of Board of Trustees

Section 1.

The Board of Trustees shall determine the time and place for regular periodic meetings of the Board. Either the Chairman or the Co-Chairman, or any three members of the Board, may call a special meeting of the Board by giving written notice to all other trustees of the time and place of such meeting at least five days before the date set for the meeting. Any such notice of special meeting shall be sufficient if sent by ordinary mail or by wire addressed to the trustee at his address as shown in the records of the Board. Any meeting at which all trustees are

present, or concerning which all trustees have waived notice in writing, shall be a valid meeting without the giving of any notice.

Section 2.

The Board shall appoint a secretary who shall keep minutes or records of all meetings, proceedings and acts of the Board. Such minutes need not be verbatim.

Section 3.

The Board shall not take any action or make any decision on any matter coming before it or presented to it for consideration or exercise any power or right given or reserved to it or conferred upon it by this trust agreement except upon the vote of a majority of all ten of the trustees at a meeting of the Board duly and regularly called or except by the signed concurrence of all ten trustees without a meeting, as provided in section 5 of this Article. In the event of the absence of any Employer Trustee from a meeting of the Board, the Employer Trustees present at such meeting may vote on behalf of such absent trustee and if such Employer Trustees cannot all agree as to how the vote of such absent Employer Trustee shall be cast then it shall be cast as the majority of them shall determine or, in the absence of such majority determination, it shall be cast as the Employer Trustee Chairman or Co-Chairman of the Board shall determine. In the event of the absence of any Employee Trustee from a meeting of the Board, the Employee Trustees present at such meeting may vote on behalf of such absent trustee pursuant to the same method and in the same manner as above provided for Employer Trustees to cast the vote of any absent Employer Trustee.

Section 4.

All meetings of the Board shall be held at the principal office of the Fund unless another place is designated from time to time by the Board.

Section 5.

Upon any matter which may properly come before the Board of Trustees, the Board may act in writing without

a meeting, provided such action has the concurrence of all of the trustees.

Section 6.

The party appointing a trustee, or successor trustee, may give the trustee so appointed such instructions as the party appointing considers for the benefit of the individual employers or employees represented by such trustee, as the case may be.

ARTICLE VI.

General Provisions Applicable to Trustees

Section 1.

No party who has verified that he or it is dealing with the duly appointed trustees, or any of them, shall be obligated to see to the application of any moneys or property of the Fund, or to see that the terms of this agreement have been complied with, or to inquire as to the necessity or expediency of any act of the trustees. Every instrument executed by the Board of Trustees or by its direction shall be conclusive in favor of every person who relies on it, that (A) at the time of the delivery of the instrument this trust agreement was in full force and effect, (B) the instrument was executed in accordance with the terms and conditions of this agreement, and (C) the Board was duly authorized to execute the instrument or direct its execution.

Section 2.

The duties, responsibilities, liabilities and disabilities of any trustee under this agreement shall be determined solely by the express provisions of the agreement and no further duties, responsibilities, liabilities or disabilities shall be implied or imposed.

Section 3.

The trustees shall incur no liability, either collectively or individually, in acting upon any papers, documents, data or information believed by them to be genuine and accurate and to have been made, executed, delivered or

assembled by the proper parties. The trustees may delegate any of their ministerial powers or duties to any of their agents or employees. No trustee shall incur any liability for simple negligence, oversight or carelessness in connection with the performance of his duties as such trustee. No trustee shall be liable for the act or omission of any other trustee. The Fund shall exonerate, reimburse and save harmless the trustees, individually and collectively, against any and all liabilities and reasonable expenses arising out of the trusteeship, except (as to the individual trustee or trustees directly involved) for expenses or liabilities arising out of wilful misconduct or gross negligence. No expense shall be deemed reasonable under this section unless and until approved by the Board of Trustees.

Section 4.

Neither the Employers, any signatory association, the individual employers, the Union, nor any of the trustees shall be responsible or liable for:

(A) The validity of this trust agreement or the Health and Welfare Plan.

(B) The form, validity, sufficiency, or effect of any contract or policy for health and welfare benefits which may be entered into.

(C) Any delay occasioned by any restriction or provision in this trust agreement, the Health and Welfare Plan, the rules and regulations of the Board of Trustees issued hereunder, any contract or policy procured in the course of the administration of the Fund, or by any other proper procedure in such administration; provided, however, that this clause shall not excuse any violation of any of the collective bargaining agreements.

(D) The making or retention of any deposit or investment of the Fund, or any portion thereof, or the disposition of any such investment, or the failure to make any investment of the Fund, or any portion thereof, or any loss or diminution of the Fund, except as to the particular person involved, such loss as may be due to the gross neglect or wilful misconduct of such person.

Section 5.

Neither the Employers, any signatory association, any individual employer, nor the Union shall be liable in any respect for any of the obligations or acts of the trustees because such trustees are in any way associated with any such Employers, association, individual employer or Union.

Section 6.

Each trustee shall be reimbursed out of the Fund for the expenses of attendance at each meeting of the Board of Trustees at the rate of ten cents per mile traveled by the trustee to attend the meeting, computed from and to the residence of the trustee, plus a flat amount of twenty-five dollars per meeting. The flat amount of twenty-five dollars shall be paid with respect to only one meeting in any one calendar month.

Section 7.

Any trustee who resigns or is removed from office shall forthwith turn over to the Chairman or Co-Chairman of the Board of Trustees at the principal office of the Fund any and all records, books, documents, moneys and other property in his possession or under his control which belong to the Fund or which were received by him in his capacity as such trustee.

Section 8.

No decision shall be made by the Board of Trustees in the administration of the Fund or Health and Welfare Plan which is unreasonably discriminatory under the provisions of the Internal Revenue Code, or under any other applicable law or regulation.

Section 9.

The name of the Fund may be used to designate the Trustees collectively, and all instruments may be effected by the Board of Trustees in such name.

ARTICLE VII.

Arbitration

Section 1.

In the event that the trustees deadlock on any matter arising in connection with the administration of the Fund or the Health and Welfare Plan, they shall agree upon a neutral person to serve as an impartial umpire to decide the dispute. The Employer Trustees and the Employee Trustees may, by mutual agreement, select an equal number of representatives from their respective trustee groups to sit with the umpire to constitute a Board of Arbitration. If such is done, the decision of a majority of this Board shall be final and binding upon the trustees and the parties and beneficiaries of this agreement and of the Health and Welfare Plan. Otherwise, the decision of the impartial umpire shall be final and binding upon the trustees, the parties and the beneficiaries of the agreement and the Health and Welfare Plan. Any matter in dispute and to be arbitrated shall be submitted to the Board of Arbitration or the impartial umpire, as the case may be, in writing, and in making its or his decision, the Board or umpire shall be bound by the provisions of this agreement, the Health and Welfare Plan and the collective bargaining agreements and shall have no authority to alter or amend the terms of any thereof. If the trustees cannot jointly agree upon a statement submitting said matter to arbitration, each group shall prepare and state in writing its version of the dispute and the question or questions involved. The decision of the Board of Arbitration or the impartial umpire, as the case may be, shall be rendered in writing within 10 days after the submission of the dispute.

Section 2.

If no agreement on an impartial umpire is reached within ten days, or within such further time as the trustees may allow for such purpose by mutual agreement, such umpire shall, on petition of either the Employee Trustees or the Employer Trustees, be appointed by the United

States District Court for the Northern District of California.

Section 3.

The reasonable expenses of any such arbitration, including any necessary court proceedings to secure the appointment of an umpire or the enforcement of the arbitration award (excluding the fees and expenses of witnesses called by the parties and the cost of any attorneys other than the Fund attorneys selected pursuant to section 5 (c) of Article IV), shall be a proper charge against the Fund. No expenses shall be deemed reasonable under this section unless and until approved by the Board of Trustees.

Section 4.

No matter in connection with the interpretation or enforcement of any collective bargaining agreement shall be subject to arbitration under this Article. No matter which is subject to arbitration under this Article shall be subject to the grievance procedure or any other arbitration procedure provided in any of the collective bargaining agreements.

ARTICLE VIII.

General Provisions

Section 1.

Subject to the provisions of the collective bargaining agreements, the rights and duties of all parties, including the Employers, the signatory associations, the individual employers, the Union, the employees and the trustees, shall be governed by the provisions of this agreement and the Health and Welfare Plan and any insurance policies or contracts procured or executed pursuant to this agreement.

Section 2.

No employee or other beneficiary shall have any right or claim to benefits under the Health and Welfare Plan, except as specified in the policy or policies, or contract or contracts, procured or entered into pursuant to section 4 of Article IV. Any dispute as to eligibility, type, amount

or duration of benefit shall be resolved by the appropriate insurance carrier or service organization under and pursuant to the policy or contract, and the employee or other beneficiary shall have no right or claim with respect thereto against the Fund or the trustees. Neither the Employers, any signatory association, the Union nor any of the trustees shall be liable for the failure or omission for any reason to pay any benefits under the Health and Welfare Plan.

Section 3.

Any notice required to be given under the terms of this agreement shall be deemed to have been duly served if delivered personally to the person to be notified in writing, or if mailed in a sealed envelope, postage prepaid, to such person at his last known address, as shown in the records of the Fund, or if sent by wire to such person at said last known address.

Section 4.

This agreement shall be binding upon and inure to the benefit of all individual employers who are now or hereafter may become members of Employers or any signatory association, and the heirs, executors, administrators, successors, purchasers and assigns of the Employers, any signatory association, any individual employer, the Union, and the trustees.

Section 5.

All questions pertaining to this agreement, the Fund or the Health and Welfare Plan, and their validity, administration and construction, shall be determined in accordance with the laws of the State of California and with any pertinent laws of the United States.

Section 6.

If any provision of this trust agreement, the Health and Welfare Plan, the rules and regulations made pursuant thereto, or any step in the administration of the Fund or the Health and Welfare Plan is held to be illegal or invalid for any reason, such illegality or invalidity shall not affect the remaining portions of the agreement, the Plan or the rules and regulations, unless such illegality or in-

validity prevents accomplishment of the objectives and purposes of the agreement and the Plan. In the event of any such holding, the parties will immediately commence negotiations to remedy any such defect.

Section 7.

Except to the extent necessary for the proper administration of the Fund or the Health and Welfare Plan, all books, records, papers, reports, documents, or other information obtained with respect to the Fund or the Plan shall be confidential and shall not be made public or used for any other purposes. Nothing in this section shall prohibit the preparation and publication of statistical data and summary reports with respect to the operations of the Fund and the Plan.

ARTICLE IX.

Non-Member Employer

Section 1.

Any individual employer who is not a member of or represented by Employers or a signatory association but who is performing work coming within the jurisdiction of the Union may become a party to this agreement by executing in writing and depositing with the Board of Trustees his or its acceptance of the terms of this agreement, in a form acceptable to the Board.

Section 2.

Any individual employer who executes and deposits any such written acceptance, or who in fact makes one or more contributions to the Fund, assumes and shall be bound by all of the obligations imposed by this trust agreement upon the individual employer, is entitled to all rights under this agreement and is otherwise subject to it in all respects.

ARTICLE X.

Amendment and Termination

Section 1.

The provisions of this trust agreement may be amended or modified at any time, and from time to time, by mutual agreement of the Employers and the Union subject to the

terms and conditions of the collective bargaining agreements and any applicable law or regulation.

Section 2.

The provisions of this trust agreement shall continue in effect during the term of the collective bargaining agreements, and any renewals or extensions thereof with respect to such collective bargaining agreements as provide for the continuation of payments into the Fund and of the Health and Welfare Plan.

Section 3.

This agreement may be terminated by the Employers and the Union by an instrument in writing executed by mutual consent at any time.

Section 4.

In no event shall the trust established by this agreement continue for a longer period than is permitted by law.

Section 5.

Upon the termination of the trust herein provided, any and all moneys remaining in the Fund after the payment of all expenses shall be used for the continuance of one or more benefits of the type provided by the Health and Welfare Plan, until such moneys have been exhausted.

Executed as of the day and year first above written.

EMPLOYER:

Northern California Chapter,
The Associated General Contractors of America, Inc.

(Sgd.) *D. Young* *President*

(Sgd.) *Winfield H. Arata*
Secretary

Central California Chapter,
The Associated General Contractors of America, Inc.

(Sgd.) *Malvin Gantier* *President*

(Sgd.) *F. G. Corher* *Secretary*

UNION:

Northern California District
Council of Hod Carriers,
Building and Construction
Laborers of the International
Hod Carriers, Building and
Common Laborers' Union of
America

(Sgd.) *Harry Sherman* *President*

(Sgd.) *Ronald D. Wright* *Secretary*

(Sgd.) *Chas. Robinson*
Business Representative

SIGNATORY ASSOCIATIONS

Associated Builders of Vallejo and Solano County

By (Sgd.) *J. H. Bryant*

Associated Home Builders of the Greater East Bay, Inc.

By (Sgd.) *John I. Hennessy*

Associated Home Builders of Northern California, Inc.

(Formerly known as Associated Home Builders of San Francisco, Inc.)

By (Sgd.)

Andrew F. Oddstad, Jr.

Associated Home Builders of Sacramento

By (Sgd.) *Richard Ronne*

Builders Exchange of Monterey Peninsula, Inc., General Contractors Division

By (Sgd.)

Thos. A. McGlynn, Jr.

By (Sgd.) *L. R. McWeisby*

General Building Contractors Association of San Francisco

By (Sgd.) *Robert L. Wilson*

By (Sgd.) *Arthur W. Baum*

General Contractors and Builders Association of the East Bay

By (Sgd.) *Alfred J. Hopper*

By (Sgd.) *J. A. Stinson*

General Contractors Association of Contra Costa County

By (Sgd.) *Frederick C. Kracke*

General Contractors Association of Fresno

By (Sgd.)

O. C. King

General Contractors Association of Sacramento, Inc.

By (Sgd.) *Carl K. Lawrence*

General Contractors Association of Stanislaus County

By (Sgd.) *A. C. Carroll*

Home Builders Association of Fresno

By (Sgd.) *Arthur L. Yager*

Marin Builders Association, Inc.

By (Sgd.) *Hubert A. Crocker*

By (Sgd.) *Carl S. Brown*

North Sacramento Valley General Contractors Association

By (Sgd.)

George E. McDaniel, Jr.

Peninsula General Contractors and Builders Association, Inc.

By (Sgd.) *Alec J. McKenzie*

By (Sgd.) *Harry E. Smith*

Redwood District Contractors Association

By (Sgd.) *R. W. Clopper*

Salinas Independent Contractors Club

By (Sgd.)

William M. Goodman

Santa Clara County Contractors & Builders Association

By (Sgd.) *M. J. Nicholson*

By (Sgd.) *W. B. Hamilton*

Tulare-Kings County Contractors Association

By (Sgd.)

G. W. Perry

By (Sgd.) *A. H. Lindquist*

ACCEPTANCE OF OFFICE BY TRUSTEES

The undersigned hereby accept office as trustees appointed pursuant to the foregoing agreement and agree to act under and be subject to all of the terms and conditions of said agreement. The undersigned hereby declare that they hold the Fund created by said agreement in trust for the uses and purposes set forth in said agreement.

EMPLOYER TRUSTEES:

Harold O. Sjoberg, *Chairman*
3604 East 16th Street
Oakland, California
ANdover 1-9772

W. F. Ames, Jr.
206 Sansome Street
San Francisco, California
YUkon 6-2288

Gordon Pollock
P. O. Box 903
Sacramento, California
Hillcrest 6-3875

Carl K. Lawrence
3020 V Street
Sacramento, California
Hillcrest 6-3835

Ernest L. Clements
P. O. Box 277
Hayward, California
LOckhaven 9-7171

EMPLOYEE TRUSTEES:

Harry Sherman, *Co-Chairman*
2525 Stockton Blvd.
Sacramento, California
Hillcrest 7-9886

Lee Lalor
25 Taylor Street
San Francisco, California
PRospect 5-9316

Ronald D. Wright
611 Berrellesa Street
Martinez, California
Martinez 360

Charles Robinson
474 Valencia Street
San Francisco, California
HEmlock 1-1181

Stuart Scofield
604-10th Street
Modesto, California

[Title of District Court and Cause.]

**NOTICE OF CROSS-MOTION FOR
SUMMARY JUDGMENT**

To Hartford Accident and Indemnity Company, one
of the above-named defendants, and to Messrs.
Dinkelspiel & Dinkenspiel and Robert J.
Drewes, Esq., its attorneys:

You and each of you will please take notice that
the above-named plaintiffs will bring the attached
Cross-Motion for Summary Judgment on for hear-
ing before the Honorable Louis E. Goodman at
Room 258 of the Post Office and Court House Build-
ing at Seventh and Mission Streets in the City and
County of San Francisco, State of California, at
9:30 o'clock a.m. or as soon thereafter as counsel
can be heard, and that the cross-motion will be based
upon the pleadings and admissions of fact on file
herein and the attached Memorandum of Points and
Authorities.

Dated January 3, 1955.

CHARLES P. SCULLY,

JOHNSON & STANTON,

By /s/ **THOMAS E. STANTON, JR.,**

Attorneys for Plaintiffs.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 4, 1955.

[Title of District Court and Cause.]

CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs herein, by their attorneys, Charles P. Scully, Esq. and Messrs. Johnson & Stanton, hereby move the court that it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiffs' favor for the relief demanded in the amended complaint against defendant Hartford Accident and Indemnity Company on the ground that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment against said defendant as a matter of law.

Dated January 3, 1955.

CHARLES P. SCULLY, ESQ.,

JOHNSON & STANTON;

By /s/ THOMAS E. STANTON, JR.,

Attorneys for Plaintiffs.

[Endorsed]: Filed January 4, 1955.

[Title of District Court and Cause.]

ORDER RE MOTIONS FOR SUMMARY JUDGMENT

This is an action by the use-plaintiffs, under the Miller Act, 40 USC §270a, to recover from Carter Construction Company, (now defunct) and the surety on its bond, employee health and welfare con-

tributions, which a collective bargaining agreement in the construction trade required the construction company to make to the Union and which it failed to pay.

Both sides have moved for summary judgment.

It is conceded that no issue of fact is tendered.

In my opinion, the use-plaintiffs, relying, as they do, upon the doctrine favoring a liberal construction of the Miller Act, here ask the statute to be stretched far beyond the limits of its objectives and purposes. Neither the language nor the purpose of the Miller Act permits the Act to be applied as plaintiffs ask.

40 USC §270a was purposed to protect those supplying labor and materials on government jobs substantially in the same way as they are protected under state mechanics' lien laws. §270a specifically provides that the bond required to be provided by contractors is "for the protection of all persons supplying labor and material in the prosecution of the work provided for in such contract."

It is agreed here that the wages of all laborers on the specific government project, with which we are concerned, were paid in full. The payments here sought to be recovered were payments which the Construction Company, along with all other employers, was obligated to pay to the Union as a health and welfare fund for Union members, under a collective bargaining agreement. They had nothing

whatever to do with this specific government job, or, in fact, with any designated job or work.

True, the amount of contribution required of each employer was calculated at so much per hour of the time worked by employees. But that was just a mere method of calculation, nothing more. It applied to all employees for all jobs. The fund itself was a device to maintain harmonious relations between employer and Union. No part of the contributions sought to be recovered had the slightest relationship to or concerned the "prosecution of the work provided for in said contract."

No authority has been cited nor have we been able to find any, which would serve as precedent for extending the reach of the Miller Act to the radical extent sought.

Defendants' motion for summary judgment is granted. The contra motion of plaintiffs is denied.

Dated January 21, 1955.

/s/ LOUIS GOODMAN,

United States District Judge.

[Endorsed]: Filed January 21, 1955.

In the United States District Court, Northern District of California, Southern Division
No. 33521

THE UNITED STATES OF AMERICA for the
Benefit and on Behalf of HARRY SHERMAN,
et al.,

Plaintiffs,

vs.

DONALD G. CARTER, et al.,

Defendants.

SUMMARY JUDGMENT

The Motion for Summary Judgment pursuant to Rule 56(b) of the Rules of Civil Procedure, having been presented, and the Court being fully advised,

The Court finds that the defendant is entitled to a summary judgment as a matter of law.

It Is Therefore Ordered, adjudged and decreed that the Motion for Summary Judgment of the defendant, Hartford Accident & Indemnity Company, be, and the same is hereby granted, that the plaintiffs have and recovered nothing by their suit, that the defendant, Hartford Accident & Indemnity Company, go hence without day, and that said defendant recover its costs and charges in its behalf expended and have execution therefore.

Enter;

Dated: This 10th day of February, 1955.

/s/ LOUIS GOODMAN,

Judge of the District Court.

[Endorsed]: Filed February 10, 1955.

Entered February 11, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America for the benefit and on behalf of Harry Sherman, Chas. Robinson, Ronald D. Wright, Stuart Scofield, Lee Lalor, William Ames, Ernest Clements, Carl Lawrence, Gordon Pollock and Harold Sjoberg, as Trustees of the Laborers Health and Welfare Trust Fund for Northern California, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on February 11, 1955.

Dated this 12th day of February, 1955.

CHARLES P. SCULLY,
JOHNSON & STANTON,

By /s/ THOMAS E. STANTON, JR.,
Attorneys for Plaintiffs.

[Endorsed]: Filed February 16, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The points on which Plaintiffs and Appellants intend to rely on their appeal heretofore filed herein are as follows:

1. The health and welfare contributions for which suit is brought are a part of the compensation

agreed to be paid for labor supplied in the prosecution of the Government projects referred to in the complaint and they are therefore within the obligation of the payment bonds furnished by Defendant and Respondent surety.

2. The obligation of the payment-bond furnished by Defendant and Respondent surety should be construed to cover claims for health and welfare contributions for the further reason that such construction will effectuate the objective of the Miller Act to protect the Government against delays on its projects.

3. The obligation to pay liquidated damages and attorneys' fees in the event of a default is a part of the total obligation assumed by the defendant/contractor in consideration for the services supplied to him, and consequently this obligation is likewise covered by the payment bond furnished by Defendant and Respondent surety.

Dated: February 23, 1955.

CHARLES P. SCULLY, ESQ.,
JOHNSON & STANTON,

By /s/ THOMAS E. STANTON, JR.,
Attorneys for Plaintiffs and
Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed February 25, 1955.

The United States District Court, Northern District
of California, Southern Division

No. 33521

THE UNITED STATES OF AMERICA for the
Benefit and on Behalf of **HARRY SHERMAN**,
et al.,

Plaintiffs,

vs.

DONALD G. CARTER, et al.,

Defendants.

Before: Hon. Louis E. Goodman, Judge.

**TRANSCRIPT OF ARGUMENT ON THE
HEARING OF MOTION AND CROSS-MO-
TION FOR SUMMARY JUDGMENT**

Appearances:

For the Plaintiff:

**CHARLES P. SCULLY,
JOHNSON & STANTON, By
THOMAS E. STANTON, JR., ESQ.**

For the Defendant:

**DINKELSPIEL & DINKELSPIEL, By
ROBERT J. DREWES, ESQ.**

Tuesday, January 11, 1955

Mr. Drewes: Ready, your Honor, for the Defendant Hartford.

Mr. Stanton: Ready.

The Court: This is the case that involves the question whether the health fund deductions are chargeable against the health bond.

Mr. Drewes: That is correct, whether the surety under the Miller Act is liable for payments which the contractor failed to make into the health and welfare fund of the union. As I pointed out to your Honor yesterday, there were three cases. The facts are almost identical and the issue is identical in each of the three cases.

The Court: Have you agreed that the decision in one will apply to all three?

Mr. Stanton: Yes, your Honor, a stipulation is on file.

Mr. Drewes: To review the facts very briefly, and the facts are not disputed, the contractor bound himself to a collective bargaining agreement along with all the other members of his particular employers association to make payments into the welfare fund of 7½ cents an hour for each hour worked for him by each individual employee within the classification with which we are concerned. The provisions of the trust agreement itself, to which the contractor is also a party, provides that the payments shall not be considered as [2*] wages, and that

the individual employee shall have no interest therein in any way, shape or form except as provided in the various policies of insurance, and so all, but procured by the trustees or purchased by the trustees with these accumulated funds.

Thereafter the contractor Carter contracted with the United States in all three of these cases—they all arise out of the same construction project—to build certain buildings at Travis Air Force Base and at Mather Field. All the payments, it is agreed, which the contracts with the United States provided were to be paid as wages were so paid by the contractor, and your Honor well knows in contracts of construction to which the United States is a party—and that is the case here as well, of course—the Secretary of Labor promulgates minimum wages for each area, those wages are posted on a job, and they become a part of the specifications of the contract, and the contractor binds himself not only by the contract but also by laws to pay those wages at those rates.

It is agreed that herein the contractor Carter made all of those payments in full. However, he did not make the payments which are spelled out and specified in the complaint in each of the three actions into the welfare funds and in the amounts that are prayed for in the complaint.

The welfare trust agreement also provides for attorneys [3] fees in the event the trustees find it necessary to employ counsel, and also to liquidated damages. The contractor and the unions agree that it would be difficult to determine what are damages

in the usual language in the event there was a default, and therefore they stipulate to the damages, and in all of these actions the trustees of the fund see attorneys fees and liquidated damages.

The Court: The trustees of this fund deem themselves, in a manner of speaking, subrogated to the rights of the United States because the United States is the beneficiary under the bond?

Mr. Drewes: Yes. This is brought under the Miller Act. Jurisdiction is conferred by the Miller Act, and the Miller Act provides all such actions shall be brought in the name of the United States. Of course, the trustees are the real parties and interests in the matter. I should say to your Honor we are not making any issue here as to their right to bring the action.

The Court: It is just a question of whether the bond is liable for the payment.

Mr. Drewes: That is right, and that is deemed to be a matter of considerable importance, and we are interested only in the adjudication of that question. We are not interested in raising any question of right to sue, capacity, or any such matters. Solely the plaintiffs seek to recover the amounts [4] which were unpaid, the amounts which the welfare agreement, the trust agreement provides shall be liquidated damages, and pay attorneys fees.

The matter has never before been decided. In my memorandum I refer to the City of Portland case. The citation is there in my brief. It is the only appellant decision that I could find, your Honor, that related in any way to this particular issue.

That is the reason you will find it set forth in my memorandum of points and authorities. It has very little bearing on the issue, your Honor, so I should save you some time in urging you not to look for it because, as I say, it is there and it is the only appellant case I could find that has anything to do with this subject. And there is another case, a federal case, a district court case which is reported in Fed. Supp., which is very close, however, and that is cited. That is United States against Landis and Young, which is also cited in my brief.

Let me say, first, that in the City of Portland case, your Honor, there is the contractor on a state job for the City of Portland also furnishing a statutory bond out of the laws of Oregon, and he contracted with a medical association to furnish medical services and hospitalization to his employees while on the job, and the remuneration was based upon a per man per hour basis as well. The fee that was to be paid to the medical association was likewise correlated to man hours [5] worked.

In that case the employer, however, deducted the cost thereof from the salaries of each of the employees. He did not pay the association, and the association similarly sued the surety. However, in that case the parties agreed the bond did not cover services of that kind, so that was not an issue in the case. The medical association attempted to establish an equitable assignment and recovered on that theory, that the laborers owed the association and the contractor had withheld money.

The Court: Did the collective bargaining agree-

ment in this case contain a provision binding this contractor that wherever he employed members of the union that required him to make this payment into the welfare fund?

Mr. Drewes: That is correct.

Mr. Stanton: - That is correct, your Honor. It is not limited to members of the union. You may be familiar with the Taft-Hartley requirement that you cannot discriminate between employees. It is not limited to union members. It is employees covered by collective bargaining agreements.

The Court: Wherever a contractor has employees who are covered by the collective bargaining agreement he has the obligation under the agreement to pay this percentage into the health fund?

Mr. Drewes: That is right. The carpenters have work [6] jurisdiction. Anybody who performs carpenter work on construction projects for these contractors they must pay.

The Court: It is not limited to any particular job, but any work the contractor does, employing these people who are covered by the collective bargaining agreement.

Mr. Drewes: Yes. So in the City of Portland case the parties had agreed that no action were lie against the surety for medical benefits of this particular kind, and the medical association tried to establish an equitable assignment, and the Court simply said there was no obligation on the part of the employees to pay the medical association anyway under any circumstance. It was purely an obliga-

tion by contract of the employer, and refused to find on any basis for equitable assignment. So the parties having agreed to the issues before this Court, it is of very little help.

In the Landis and Young case, however. I feel that is a good deal more persuasive and we will rely on that to a considerable extent. In that case the claimant was another insurance company to whom the contractor owed premiums for employers liability insurance and he had not paid it. And so there were a number of parties. As a matter of fact, the insurance company claimant was in intervener. They intervened in a suit, came in and said, "We have not been paid our premiums on this insurance policy. We are entitled to recover because we have furnished medical services and hospitalization [7] which were used in the prosecution of the work," which I conceive is very close to the issue that is before your Honor, and the judge in that case said, "No." He said he could not go along with them. He said the furnishing of medical benefits of that kind added nothing of value to the construction and it was only in the nature by analogy to the repair of the equipment, that he failed to see how furnishing medical benefits to the laborers in any way forwarded the prosecution of the work. At best it kept them working, because though a machine had broken down and a repairman was called in to fix it up; to that extent the repaired machine could then be used, and the work was forwarded, but only in that indirect way.

The judge said he could scarcely conceive a man who had worked repairing a machine which had

broken down on a job could assert a mechanic's lien against the job. Similarly I fail to see how a doctor or a medical association or one furnishing medical benefits of this kind can come in and say, "We have added something. We have furnished labor in the prosecution of the work." So I feel the Landis and Young case is very close to the one before this Court.

There being on the books no holding in the matter we rest our case on this, that the medical and welfare benefits of this kind may not be recovered from the surety because they fall neither within the letter of the Miller Act nor are they within its spirit. The Miller Act and the bond which the [8] defendant partly furnished in this case, one provides and the other is conditioned upon that all those persons who furnished labor in the prosecution of the work provided for in the contract shall be paid in full. So it appears that before a claimant may recover, he must show that he furnished labor firstly; and secondly, it was in the prosecution of the works; and thirdly, it was provided for in the contract.

As against those positive requirements of the statute, it does not appear that the plaintiffs in this action can recover for the reason that those for whom they sue, the individual workman, has been paid in full. It is not contested that they were paid the full wages, which it was required that the contractor pay them under the contract. The benefits which they were to receive are not wages to paid them for the prosecution of the work but are classed in that very broad class which are usually called

"shop" conditions or conditions of work rather than wages. Your Honor well knows that the range of things for which employers and employees bargain in these times is extremely extensive.

The Court: Of course, there might well be a distinction between so-called conditions of work that are not translatable into the payment of money as distinguished from those that are. I suppose the argument can be made that this payment into the health benefit fund is a part of the wages of the employee but that the employer, instead of paying it to the workman who pays [9] it into the fund, pays it directly to the fund. Maybe that will be a contention. I do not know.

Mr. Drewes: I am sure that Mr. Stanton will advance that particular point. That is the obvious argument on the other side of the picture. Our position is it is not wages. There is nothing that is presently due the workmen as a result of their labor. By their own agreement they have no present interest in it, they have only a beneficial interest in the proceeds or the right to participate at some time in the future upon condition.

The Court: It is a benevolent condition that pertains to all the workers and not any particular one.

Mr. Drewes: Yes. I want to pursue that a little further and this I think is of the essence. I mention this but I do not spell it out in my brief. The construction industry, as your Honor very well knows, is characterized by hourly employment and by a highly fluctuating employment, not only on a job

basis, but on a seasonal basis. The provision in the welfare agreement that the 7½ cents an hour be paid, I contend, was probably convenient and possibly the only method adopted by the parties to relate the amount or the benefits to be conferred to the conditions of employment of the industry. In other words, it was a convenient means of measuring the benefit that was adopted by the parties on the amount of the benefit, but they could have adopted another just as easily. [10] Suppose the parties had agreed as a result of the collective bargaining that the contractor would provide a policy of insurance for medical services on a particular job. That is as was done in the City of Portland situation. The point I am trying to make is that the method that was used by the parties here gives it a certainty, the appearance of a wage because it is fixed in amount and it is easy to be ascertained.

The Court: This is a health and benefit fund.

Mr. Drewes: Yes.

The Court: Out of which the employees get taken care of in case of illness and also—what other purposes does the fund have?

Mr. Stanton: Your Honor, it provides life insurance, it provides accidental death and dismemberment insurance, it provides hospitalization and surgical on a scheduled basis, reimbursement of surgical fees; the laborer's fund that we are now dealing with also provides x-ray reimbursement benefits and what is called a supplemental accident benefit up to \$300. That is the type of thing that these funds buy. Their authority extends to any-

thing that would fall within the concept of life insurance and health and accident insurance.

The Court: A member of the union, one who is a beneficiary of the provisions of the collective bargaining agreement, would have a right to get benefits from that fund even if he was not working, wouldn't he? [11]

Mr. Stanton: That is correct.

The Court: Suppose he worked on one job, did not work for a month, and then went on another job. In the interval between jobs would he be entitled to the benefits of that contract?

Mr. Stanton: He must work a certain number of hours to become eligible. In the carpenters fund they must work 400 hours in a six month period.

The Court: You do not mind my interrupting to get these facts?

Mr. Drewes: Of course not.

Mr. Stanton: I am sorry. I said carpenters fund. In the laborers fund. It has been for some time, since that started, 400 hours in a six month period. A man who has worked that number of hours, regardless of the employers he has worked for, so long as that number of employers has paid a total of 400 hours into the fund, the man is entitled to the insurance protection for the succeeding six-month period. He gets it regardless whether he continues to work in the industry. Of course, he has to continue working to acquire eligibility for the next six month period. It is a continuing proposition. He has some definite benefits established as soon as he works 400 hours.

The Court: As a practical matter, Mr. Stanton, how is it this contractor did not pay this [12] amount?

Mr. Stanton: He pays it—

The Court: He did not pay these particular amounts.

Mr. Stanton: That is right. He is bankrupt.

Mr. Drewes: He is not in business. He is bankrupt.

The Court: I did not think this case would be here if he were still in business.

Mr. Stanton: That is correct, your Honor.

Mr. Drewes: My point is that the particular method that the parties used to measure benefits that the contractor was to give to the employees should not mislead us to divert our attention from the principle involved, and the principle is whether or not these benefits constituted labor furnished in the prosecution of the work provided for in the contract. Surely the contractor, if the parties had so agreed, could have provided these benefits in a somewhat unsatisfactory way by hiring a doctor and directing the employees to a nearby hospital at his own expense, that is, any of the workmen who had been injured on the job. I mean there are other ways to accomplish this particular objective which, had they been adopted, would have put the picture in more perspective. Sir, my position is that these benefits are not related to the work at all, and my authority for that is the Landis-Young case, which is the only case I have been able to find which was decided on facts such as these.

The only other point is benefits of this kind should be [13] recoverable because they are not within the spirit of the Miller Act. The purpose of the Miller Act, as has been said, is to provide for those who are furnishing materials and supplies for a government job of the same protection that is given to persons similarly situated by the mechanic's lien laws of the states, and the theory of the mechanic's lien laws of the states, it has been said, is to protect those who have created value, who by their work or by their services have created something of value on the land of the one who has ordered the work be done. And so we think in principle, too, it can be shown that the value which these workers have contributed to the works which were erected on the property of the United States they have been compensated for in full through their wages and benefits which the contractor bound himself to give are not wages but pertain to the conditions of employment, just as there are many others—the furnishing of work clothes or the furnishing of company houses. There are many other benefits of employment which clearly do not create value or add anything to the value of the construction. Our authority is also Landis and Young. That reasoning is advanced in that particular case.

Mr. Stanton: Your Honor, I want to dwell a bit on the nature of these payments, that we are suing for. I want to make it clear that we are not suing for the benefits. That is something that is established under insurance policies which the funds

have negotiated. We have not premised our [14] suit on any theory that there have been any supplies furnished in connection with this job. The Miller Act provides that the bond shall provide that the contractor and the surety agree to pay for the services and supplies or labor and supplies furnished in connection with the prosecution of the work. That is the statutory language, or it is very close to it. It says nothing about the payment of wages. It is an obligation to pay for labor, and the Court of Appeals of this circuit in a case which we quoted in a brief has said that that obligation is to pay in full. The obligation we seek to enforce, the principle obligation, is the 7½ cents that was due to the fund. That is a definite amount. It is measured by the hours worked. It seems to us so clear that it is a part of the consideration for the services performed that it is a little difficult to start any argument on that point, but I did face in arguing the matter before the Municipal Court the impression which the judge had that unless I could bring it within the concept of wages I was out of court.

In connection with that attention was drawn to the provision in the trust agreement which Mr. Drewes has quoted to the Court. The trust agreement is attached as an exhibit to the stipulated facts. In that trust agreement there is a section, and since the wording of it has some bearing on the argument, I will read it. It is short:

"Contributions to the fund shall not constitute [15] or be deemed to be wages—"

and I will go on because this is the pertinent language—

“wages due to the employees with respect to whose work such payments are made, and no employee shall be entitled to receive any part of the contributions made or required to be made to the fund in lieu of the benefits provided by the health and welfare fund.”

Then in a subsequent provision of the trust agreement which I have referred to in the brief you will find a provision which says the rights of employees are limited to the payments payable under these contracts, insurance policies which have been negotiated by the fund.

There is reason for that provision. As these funds are set up in the construction industry it is not possible to provide the benefits for the man who works only ten hours. The amount of money that is paid in with the respect to such a man would not be adequate to provide the type of protection that would be of any value to the man. The funds have been negotiated so there is this eligibility requirement, which is a matter worked out by trustees of both the carpenters and laborers funds at the present time. It is 400 hours within a six-month period, which is a pretty liberal—when I say “liberal,” that is not very much to require when you consider the funds cover the 46 counties of northern California, so that any construction work that is performed, unless it be a single [16] job, by what might be called an independent contractor who has

not been reached by the union, the contractor is obligated to pay into this fund. The man-hours go into a credit on his account when the six-month period is up. He then has coverage. He is advised of his coverage. He is furnished a certificate, an insurance certificate which gives him evidence of his coverage, and whenever his claim comes up it is paid. They are in active operation.

The Court: Assuming that an employer who is a party to this agreement did not pay his required amount, and assuming a union did not take direct action against him, they could maintain a suit, I assume, to recover from the employer these amounts of money?

Mr. Stanton: The union could maintain?

The Court: Someone could.

Mr. Stanton: The trustees could, your Honor.

The Court: The trustees could maintain a suit to recover from the employer this amount of money.

Mr. Stanton: Yes, and this is a suit to recover the contributions due from this particular employer with respect to hours that were worked on these government contracts. The surety has been joined because of his obligation, which we contend is covered within the scope of his bond, the surety's bond. It is a bond to pay the contributions that were due with respect to work that is performed on particular projects. [17]

The Court: Suppose a contractor was building a building for me and he did not pay into that fund. Would there be a lien on my property?

Would the trustees have a right to a lien on my property?

Mr. Stanton: A mechanic's lien, your Honor? We have not attempted to enforce a lien. Certainly it is a part of the consideration to be paid for labor. Whether we can bring ourselves within the—

The Court: Suppose, as I say, I had a contractor to build a building for me and the contractor did not pay that. My contract provides that he furnish all of the labor and materials for that job for which I pay him a certain amount of money.

Mr. Stanton: Yes.

The Court: Is it any concern of mine what he has to pay to get labor?

Mr. Stanton: It is ultimately. If he does not pay and liens are filed, because the lien is for the amount that he had agreed to pay.

The Court: Suppose he agreed to pay the labor the union a dollar a man for some fund.

He was using for some beneficial purpose for the men. He agreed to pay the union a dollar a man for every man that they furnished to work on my building. Would that be something for which I was obligated to pay unless it was provided for in my contract, any more than I would have to pay for the salary [18] of his advertising man, the contractor's advertising man, his accountant, or anything else? There might be a distinction there.

Mr. Stanton: This is distinctive from his ad-

vertising, his overhead obligations. He would have to pay the subcontractor.

The Court: He might have employed a man whose business it was to get the proper men from the union.

Mr. Stanton: If his work is related to your project, yes.

The Court: I would not be liable for the payment of that specific money because my obligation is limited to pay the contractor his price. The protection that I get under the mechanic's lien law and that is afforded by the Miller Act is that I do not get stuck for the payment of those who would have a lien on my property for services rendered. That is a theory of the mechanic's lien law.

Mr. Stanton: That is a theory of the mechanic's lien law. It is not necessarily a complete answer to the Miller Act.

The Court: It may be that has a broader indication to it because of the fact that public work is involved in it, and there may be public policy interwoven with it. Suppose in this case, Mr. Stanton, instead of the employer contracting to pay 7½ cents an hour into this fund that he contracted to have a doctor present to administer to the health of these men—that was in his collective bargaining agreement—that he broke [19] that and the union had to furnish a doctor: Would the contractor's breach of the agreement and the consequent cost of doing that which the contractor had agreed to do in furnishing a doctor become a lien on the property?

Mr. Stanton: I think it would, your Honor. I do not have the answer.

The Court: I'm just asking these questions rhetorically to try to see what the reasoning is.

Mr. Stanton: The question whether a foreman's compensation is to be covered by the California mechanic's lien law went to the California Supreme Court rather recently and they said, yes, his services were labor within the meaning of the mechanic's lien law. Whether they would go farther and say a doctor hired—

The Court: I can follow that. If the doctor was not paid he would have a claim against the contractor, and it might properly be held there that was a lien against the property, because of the contribution he is making toward the building.

Mr. Stanton: Your Honor is pointing out something I want to make clear. The trustees are suing on the right of the laborers.

The Court: I understand.

Mr. Stanton: The thing that points that up very clearly is the way Congress has approached these funds. The Taft-Hartley Act, Section 302, sets up certain requirements. The major one is that these funds be placed in the hands of trustees and [20] administered as such. I have quoted in the memorandum the statement which explains why that is the case. The gist of it is that in the eyes of Congress this money that goes into these funds is a part of the consideration paid for the services of the man, and Congress so understood in being sure that the man got the benefit of those payments that

there was no diversion by union officials. But there could be other things that would take place if the fund were not in the hands of trustees and under the obligation of the trustees—

The Court: Those are matters which pertain to the relationship between an employer and employee. There is a different policy behind that. ~~Here we have a narrower question as to whether or not somebody else can be compelled to pay for that, that somebody else being the owner of the building.~~ The person for whom the construction work is done would be chargeable under this theory you are propounding for the performance of an agreement between an employer and an employee. That has its genesis in the field of public policy for the general regulation and maintainance of relations between employer and employee. I do not think the burden of that ever shifts to the man with whom a contract is made to erect a structure unless it is directly made a provision of a contract. I do not see how that could be made. What has happened here is the employer and employee have entered into an agreement in order to fix the standards that usually exist as between the employer [21] and employee in all their relationships, provided the employee and employer both contribute something.

Mr. Stanton: The employee does not contribute.

The Court: The employer has to contribute to this fund as one of the requirements of the relationship between the employer and the employee, and that arises out of their relationship to one an-

other. It is pretty hard for me to see how you can carry that as a cost of a particular building. That is part of the employer's general overhead and cost of doing business, just as he has to carry insurance to protect himself, like he has to carry other burdens which go to the carrying out of his business generally without relation to any particular contract.

Mr. Stanton: This is directly related to the labor that is performed, your Honor.

The Court: It is measured according to the wages paid but it arises out of the relationship.

Mr. Stanton: There are other connections, your Honor. It is negotiated at the same time in the same agreement that the wage rates are negotiated. I do not think there could be any dispute that as far as the wage rates are concerned, that the wages that are paid are recoverable if they are not paid by the contractor from the surety.

The Court: Oh yes. That is the wages and compensation for the labor performed upon the structure. [22]

Mr. Stanton: And the particular wage rate that is worked out by the collective bargaining agreement.

The Court: Whatever those wages are they are recoverable.

Mr. Stanton: In other words, if they negotiate a 15 cent increase and that work is done during the period when that increase becomes effective, that is a cost of the labor. We take the position flatly that this 7½ cents is also a part of the cost

of the labor. It is negotiated by the unions on behalf of the employees. They are speaking for the employees in this particular case. The money, while it is being paid by the employer to the fund rather than directly to the employee, and while it is not set up as a deduction from the employee's wage, still it is a matter that is bargained, and I can assure you—

The Court: He does not have to pay income tax on that.

Mr. Stanton: That is correct, your Honor. By virtue of the provisions of the internal revenue code; it could have been the other way, because there are certainly benefits, that if the money were paid directly to the man he would not be able to deduct what he paid out if he had bought the insurance. He would not be entitled to deduct whatever he paid out in premiums for this insurance in computing his personal income tax. So in another way of handling the procurement of these benefits there could be an income tax incident falling upon the employee. But that is not the case under these funds. [23]

The Court: Very frankly I do not think this case is of too much importance because it is not a thing that is very likely to happen.

Mr. Stanton: It does not happen as long as the job has to go on, because if the surety is paying the bill and sees that these welfare funds are paid—because, as I pointed out in our brief, being a part of the collective bargaining agreement, the unions take the position that when the contribu-

tions are not paid, it constitutes a breach of the collective bargaining agreement and they have asserted the right to strike.

The Court: How are the contractors required to pay these amounts? On a monthly basis, quarterly basis?

Mr. Stanton: Monthly.

The Court: And, of course, the regular wages are paid most of the time weekly.

Mr. Stanton: Yes. I do not know whether it is a requirement of the federal law, but most of the collective bargaining agreements provide for payment weekly, and I am sure that is the practice. We do have defaults though, and with a fund as large as the carpenter's fund, for instance, in which 40,000 men are reported on and 6 or 7,000 contractors pay into the fund or record into the fund for an hour or more, while the individual case may not involve a great deal, still, particularly with the Miller Act—there was a revision when the Miller [24] Act was adopted, I think, back in 1940, but at any rate it had predecessors, and congressional action may not change as easily perhaps as a state action can be changed. The construction of the act becomes important, and your Honor will see from the authorities we cite in the brief the Supreme Court has definitely said the Miller Act is to be construed liberally, and we have cited your Honor to one case arising recently, a Court of Appeals case, in favor of the supplier. They hold that the supplier was entitled to the protection of the act where he had supplied the material to a con-

tractor to replace material which the contractor used on a government job. In other words, the supplies for which the claimant was allowed had not actually gone into the job but on a liberal construction it was shown—

The Court: The evidence must have been pretty clear. That is a pretty far-fetched document.

Mr. Stanton: When you analyze the fact that a railroad is entitled to a claim for freight on goods shipped to a job, and the Supreme Court held—admittedly liberal interpretation of the Miller Act—but when you read those cases you realize—

The Court: The railroad is a closer; that is a closer picture.

Mr. Stanton: They did it under the theory that it was labor, and the operation of the engines constituted labor, which is a pretty broad stretching of the language of the act, [25] and an early Supreme Court decision, which we have cited and quoted, says that you must give attention to the spirit of the act as well as the letter, and when you analyze the cases that have been decided, the Supreme Court cases, it seems pretty clear that the Court has gone very far under the Miller Act in giving protection to grocerymen who supply supplies to workmen who have worked on projects.

The Court: May I interrupt again? Was this cost-plus contract with the government, do you happen to know?

Mr. Drewes: My best recollection is it was a lump sum. I am not certain about that. I have the

contracts in my office. They are fairly recent contracts. They are not old contracts.

Mr. Stanton: I am sure it was, your Honor. Then another Supreme Court case, which is cited in the memorandum, where the argument was made—it was the railroad reimbursement for freight—the argument was made, well, the railroad does not need this claim under the bond. It is protected by its lien. It can enforce its lien. The Supreme Court pointed out and referred to an opinion of the Circuit Court, which also pointed out that, true, the railroad might enforce its lien, but if it did enforce its lien it would follow the job, and one of the other basic purposes of the Mortgage Act is to protect the government from delays. As pointed out in the memorandum, we feel that that decision and that language is very pertinent to our case because, since it is a negotiated [26] provision of the collective bargaining agreement, and the unions have asserted and, as far as we know, and we represent employers in other matters, there is no practical way in which to prevent them from taking action where they can legitimately claim that the collective bargaining agreement has been breached to withhold a workman. So it is of importance to the government in carrying out that aspect of the Miller Act to hold that these contributions are within the protection of the bond.

Counsel has cited a number of authorities in this memorandum. He has relied principally upon the Landis case, which involved workmen's compensation and premiums. I believe he cited one or two

other authorities that also hold that workmen's compensation premiums are not recoverable by the insurance company under a Miller Act bond. We distinguish those cases by the fact, at least in California, under the California law an employer is prohibited by law from including or deducting or any anyway—I do not want to misquote the statute; I have quoted it in the memorandum—charging workmen's compensation premiums to the compensation of the workman with respect to whom the insurance is secured. That is tied in with the policy and theory behind the workman's compensation act. In other words, Section 3751 of the California labor code prohibits the making or taking any deduction from the earnings of any employee, either directly or indirectly [27] to cover the whole or any part of its workmen's compensation obligation, which seems to us clearly sets the workmen's compensation obligation apart from any compensation for labor. On the other hand we feel that these contributions to the welfare fund, negotiated by the representative of the employees as a part of the collective bargaining agreement that provides the wages the men have, is a consideration for the services provided.

Your Honor referred to the fact that it was a sort of a general thing not related to the particular job. That could be true on a small government project. On a major government project that goes on for two or three years that would be even substantially less true, and as you know, government projects tend to be large. It is certainly related

directly to the work the man does. If all he does during this six-month period is work on government projects for one or more contractors doing government work, he gets no benefit unless payments are made into the fund on his behalf and they relate it to the hours that he works.

As pointed out in the memorandum, we also claim for liquidated damages, and the attorneys fees, and we claim them as part of the total obligation of the contractor for labor, and we take the position that on the authorities that exist in this field in construing the Miller Act, No. 1, to carry out the policy of seeing that laborers are paid in full, this [28] type of contribution should be held to be within the bond and, No. 2, to carry out the policy to protect the government against delays this contribution should be held within the obligation of the bond.

The Court: I understand the situation unless you want to add something.

Mr. Drewes: No. I believe your Honor understands the problem clearly.

The Court: I will look at the memorandums you filed.

Mr. Drewes: With respect to the attorneys fees you will find three cases on the subject cited, both in Mr. Stanton's brief and in mine. With respect to liquidated damages our position is that the surety is not bound by agreement between the contractor and the union, and it is the universal rule that a surety is not liable for liquidated damages, but the authorities are cited in our briefs, your Honor.

Just one other point. The counsel states that one of the purposes of the Miller Act is to avoid delays on a job, and as I stated in my brief, your Honor, the short answer to that is the Miller Act also requires a performance bond, which was duly executed and furnished by Carter, and it is an exhibit to our brief statement of facts and that is conditioned on completion of a job within the time allowed, and I had comments under various cases in connection with the allowance of freight, and so on. I do not believe they are material to [29] the issues here. The Landis and Young case, as I pointed out to you in my opening argument, was an action in which the carrier sought to recover unpaid premiums, contending it had furnished similar services, and it is cited only for the principle. I call your Honor's attention that another district judge was of the opinion that benefits of this kind did not add any value to the job, were not lienable, and were not furnished in the prosecution of the work. It is quite true, as Mr. Stanton states, that the Supreme Court has held, and the courts generally have held that the Miller Act is to be liberally construed, but nevertheless the liability of the assured is limited to the provision of the statute that those furnishing supplies and labor in the prosecution of the work provided for in the contract shall be paid in full, and we contend, of course, they have been paid in full in this case for such labor as they furnished in the prosecution of the work. And so we will submit the matter, your Honor.

The Court: Mark it submitted.

Certificate of Reporter

I (We,) Official Reporters(s) and Official Reporter(s) pro tem certify that the foregoing transcript of 30 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting to the best of my (our) ability.

/s/ [Indistinguishable.]

[Endorsed]: Filed April 7, 1955. [30]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this court in the above-entitled case; and that they constitute the record on appeal herein as designated by the parties:

Amended Complaint.

Notice of Motion and Motion for Summary Judgment.

Admissions of Facts for Purposes of Motions for Summary Judgment.

Notice of Cross-Motion for Summary Judgment.

Cross-Motion for Summary Judgment.

Order Re Motions for Summary Judgment.

Summary Judgment.

Notice of Appeal.

Cost Bond on Appeal.

Designation of Record by Plaintiffs and Appellants.

Statement of Points on Appeal.

Designation of Record by Defendants and Appellees.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 28th day of March, 1955.

C. W. CALBREATH,

Clerk;

By /s/ WM. C. ROBB,

Deputy Clerk.

[Endorsed]: No. 14703. United States Court of Appeals for the Ninth Circuit. United States of America for the Benefit and on Behalf of Harry Sherman, Chas. Robinson, Ronald D. Wright, Stuart Scofield, Lee Lalor, William Ames, Ernest Clements, Carl Lawrence, Gordon Pollock and Harold Sjoberg, as Trustees of the Laborers Health and Welfare Trust Fund for Northern California, Appellant, vs. Donald G. Carter, Individually; Donald G. Carter, Doing Business as Carter Construction Company, Carter Construction Company and Hartford Accident and Indemnity Co., Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 28, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit
No. 14703

THE UNITED STATES OF AMERICA for the
Benefit and on Behalf of HARRY SHER-
MAN, et al.,

Plaintiffs and Appellants,

vs.

DONALD G. CARTER, et al.,

Defendants and Appellees.

APPELLANTS' STATEMENT OF POINTS ON
APPEAL AND DESIGNATION OF REC-
ORD FOR PRINTING ON APPEAL

Appellants hereby adopt the statement of points on appeal and the designation of record heretofore filed by them in the above-entitled proceeding with the United States District Court, Northern District of California, Southern Division, and appearing in the typed record herein, as Appellants' Statement of Points and Designation of Record for Printing on Appeal pursuant to Paragraph 6 of Rule 17 of the Rules of Practice of the above-entitled court.

Dated March 31, 1955.

CHARLES P. SCULLY,
JOHNSON & STANTON,

By /s/ THOMAS E. STANTON, JR.,

Attorneys for Plaintiffs and
Appellants.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 2, 1955.

[fol. 61B] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
December 8, 1955 (omitted in printing)

[fol. 62] IN UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

Before: Healy and Lemmon, Circuit Judges, and Byrne,
District Judge.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND
FILING AND RECORDING OF JUDGMENT—January 10, 1956

Ordered that the typewritten opinion this day rendered
by this Court in above cause be forthwith filed by the Clerk,
and that a Judgment be filed and recorded in the minutes
of the Court in accordance with the opinion rendered.

[fol. 63] IN UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

No. 14,703

UNITED STATES OF AMERICA for the Benefit and on Behalf
of Harry Sherman, Chas. Robinson, Ronald D. Wright,
Stuart Scofield, Lee Lalor, William Ames, Ernest
Clements, Carl Lawrence, Gordon Pollock and Harold
Sjoberg, as Trustees of the Laborers Health and Welfare
Trust Fund for Northern California, Appellants,

vs.

DONALD G. CARTER, Individually; DONALD G. CARTER, Doing
Business as Carter Construction Company, CARTER CON-
STRUCTION COMPANY and HARTFORD ACCIDENT AND INDEM-
NITY Co., Appellees.

Appeal from the United States District Court for the
Northern District of California, Southern Division

Before: HEALY and LEMMON, Circuit Judges, and BYRNE,
District Judge.

OPINION—January 10, 1956

BYRNE, District Judge

Appellants filed suit on a bond furnished by Carter, as
contractor, and executed by Hartford Accident and Indem-

nity Company, as surety, pursuant to the provisions of the Miller Act (40 U.S.C. 270(a) et seq.) to recover health and welfare contributions alleged to be due on account of labor performed on public work of the United States. The District Court granted Hartford's motion for summary judgment and this appeal followed.

The material facts which are not in dispute may be summarized as follows: Carter as general contractor entered [fol 64] into two written contracts with the United States of America for the construction of certain buildings at Travis Air Force Base and Mather Field in California. Under the terms of the contracts Carter was required to furnish the materials and pay the labor at wage rates set forth in the specifications which were a part of the contracts. Under the terms of the bond Hartford was obliged to make these payments in the event Carter defaulted. During the critical period with which we are concerned, there was in existence a collective bargaining agreement entered into between an employers' organization, of which Carter was a member, and an employees' organization of which the laborers employed by Carter were members. Pursuant to this agreement Carter was obligated to pay into a "Health and Welfare Fund" the sum of seven and one-half cents per hour for each hour worked by laborers employed by him. Carter paid in full the wage rates required under the terms of the contracts, but did not make the contributions to the Fund as he was obliged to do under the collective bargaining agreement. Following this default Carter became a bankrupt and the trustees of the Fund are here seeking recovery of the delinquent health and welfare contributions from the surety.

The question for decision is whether the surety is liable under its bond for the delinquent health and welfare contributions. Not only is this a question of first impression, but there is a dearth of cases involving analogous questions. Appellants rely upon *Sherman v. Achterman* decided by the Appellate Department of the California Superior Court and unreported. As noted by the Court in that case, it was an action upon a bond required by a state statute and is clearly distinguishable from a case involving a Miller Act bond.

The Miller Act, Section 270(a) of Title 40 U.S.C., re-

quires that before any contract exceeding \$2,000 for the construction of a public work of the United States is awarded to any person, such person must furnish to the United States a payment bond *for the protection of all persons supplying labor and material* in the prosecution of the work provided for in said contract. Section 270(b) of the Act provides that every person *who has furnished labor or material* in the prosecution of the work and who has not been paid in full therefor shall have the right to sue on such payment bond for the *sum due him*.

[fol. 65] It is at once apparent that recovery on a Miller Act bond is limited to persons who have "furnished labor or material in the prosecution of the work provided for in said contract". There is no contention that these appellants who were plaintiffs below furnished labor or material in the prosecution of the work provided for in said contracts, but they contend that the Miller Act is to be liberally construed and that in so construing it we should disregard the plain requirement of the Act.

The appellants argue that the payments which the contractor agreed to make to them were a part of the consideration and compensation for the labor which was performed on the contracts. It is true that the agreed contributions were *measured by* the amount of labor performed on the projects and it might even be said that the agreement to make the contributions was a part of the consideration for the contract between the contractor and the Union, but that is not the test for recovery here. Recovery can be had on a Miller Act bond only by a "person who has furnished labor or material" and recovery is limited to "sums justly due" such persons. The agreement between the Associated General Contractors and the Union specifically provides that contributions to the Fund shall not constitute or be deemed to be wages due to the employees with respect to whose work such payments are made, and no employee shall be entitled to receive any part of the contributions made or required to be made.

The appellants are not persons who furnished labor or materials and therefore may not maintain an action for recovery on the bond. Even if we were to assume that they were authorized to maintain the action for and on behalf of persons who furnished labor, recovery could not be had

because the delinquent payments sought to be recovered are not "sums justly due" the persons who furnished the labor.

Affirmed.

[File endorsement omitted.]

[fol. 66] IN UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

No. 14703

UNITED STATES OF AMERICA for the Benefit and on Behalf
of HARRY SHERMAN, etc., Appellant,

vs.

DONALD G. CARTER, Individually; etc., et al., Appellees.

JUDGMENT—Filed and entered January 10, 1956

Appeal from the United States District Court for the
Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the
Record from the United States District Court for the
Northern District of California, Southern Division, and was
duly submitted.

On consideration whereof, it is now here ordered and ad-
judged by this Court, that the judgment of the said Dis-
trict Court in this cause be, and hereby is affirmed, with
costs in favor of the Appellees and against the Appellant.

IT IS FURTHER ORDERED and adjudged by this Court,
that the Appellees recover against the Appellant for their
costs herein expended and have execution therefor.

[File endorsement omitted.]

[fol. 67] Clerk's Certificate to foregoing transcript omitted
in printing.

[fol. 68] SUPREME COURT OF THE UNITED STATES,
October Term, 1955

No. 752

UNITED STATES OF AMERICA FOR THE BENEFIT AND ON BEHALF
OF HARRY SHERMAN ET AL., PETITIONERS,

VS.

DONALD G. CARTER, INDIVIDUALLY, ETC.

ORDER ALLOWING CERTIORARI—Filed April 30, 1956.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9246-0)